IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.09.2006

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

C.R.P.(PD) No.1032 of 2006

K.Ashraff … Petitioner/2nd defendant

Vs.

S.Gangaraman … Respondent/Plaintiff

Prayer : Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 30.06.2006 made in I.A.No.297 of 2006 in O.S.No.65 of 2005 on the file of Addl. District Judge, Fast Track Court No.1, Coimbatore.

For Petitioner : Mr.R.T.Doraisamy

For Respondent : Mr.M.Baskar

O R D E R

Civil Revision Petition is filed against the order dated 30.06.2006 made in I.A.No.297 of 2006 in O.S.No.65 of 2005 on the file of Addl. District Judge, Fast Track Court No.1, Coimbatore in refusing to mark the xerox copy of the unregistered Lease Deed, dated 07.07.1989, through the plaintiff at the time of his cross-examination.

2. The brief facts leading to the filing of this petition are as follows:

(i) The respondent is the plaintiff in the suit. According to him, one Mrs.P.A.Fathima, wife of the first defendant in the suit, after receiving proper and valid consideration of Rs.1,90,000/- from him, executed a registered Mortgage Deed, dated 23.03.1990 in favour of the plaintiff, in respect of the property at Coimbatore. She agreed to repay the mortgage amount with interest at the rate of 24% per annum and also agreed to redeem the mortgage within three years, failing which the penal interest of 30% would be levied on the mortgage amount.

(ii) The said Fathima failed to repay the amount and that there was exchange of legal notices between her and the plaintiff. Since she expired, her husband, the first defendant and her son, the 2nd

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defendant in the suit became liable to pay the mortgage amount. Therefore, the plaintiff filed a suit against the legal representatives of the deceased mortgagee for a decree to pay a sum of Rs.10,38,284/- with subsequent interest at the rate of 30% per annum on Rs.1,90,000/- from the date of the suit till the date of realization.

(iii) The defendants filed a written statement and contended that the first defendant / petitioner in the revision petition was a tenant in Door No. 21-C, Oppanakkara Street, Coimbatore and was running a Hotel in the name and style of "Friends Café" for several years. Subsequently, during 1989, he was not able to run the Hotel and as a result, he let out his hotel premises to the plaintiff on lease for a period of 5 years on a monthly rent of Rs.14,000/-. The terms and conditions was reduced in writing and a Lease Deed, dated 07.07.1989 was executed. An advance of Rs.2,50,000/- was paid by the plaintiff to the first defendant.

(iv) The plaintiff defaulted in payment of rent to the first defendant and he was also not able to continue the hotel business. Therefore a sum of Rs.60,000/- was deducted towards the payment of monthly rent and the balance of Rs.1,90,000/- was to be paid by the first defendant. At that time, the first defendant was not in a position to repay the said amount. The plaintiff suggested for execution of a Mortgage Deed by the wife of the first defendant as a security for the outstanding advance amount and under such circumstances, the Mortgage Deed was executed. The said document is only a sham and a nominal one and not intended to be acted upon. The balance amount of Rs.1.90,000/- was repaid in instalments, for which the plaintiff had issued receipts. Unfortunately, the receipts were destroyed in the fire due to communal violence in the year 1998 at Coimbatore. There is no privity of contract between the plaintiff and the defendants and no amount is due to the plaintiff. The defendants further contended that the mortgage deed is not supported by any consideration. Hence, they prayed for dismissal of the suit.

3. During the cross-examination of the plaintiff, the 2nd defendant tried to mark certain documents. The plaintiff/respondent denied the existence of the documents, therefore the 2nd defendant filed I.A.No.297 of 2006, contending that the documents mentioned in the petition were mixed up with other documents, due to which, he was unable to produce it along with the written statement. The said documents would reveal the true nature of the case and hence he prayed to grant leave to produce the documents, viz., (1) the xerox copy of the unregistered Lease Deed, dated 07.07.1989 said to have been executed by the first defendant in favour of the plaintiff (2) certified copy of the F.I.R., dated 16.12.1997 and (3) Receipt for a sum of Rs.50,000/-, dated 13.11.2000 issued by the plaintiff.

4. The respondent/plaintiff filed a counter affidavit and

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contended that he never executed any document as mentioned in the petition. The alleged Lease Deed, dated 07.07.1989 (Document No.1) and the receipt, dated 13.11.2000, (Document No.3), in original, are manipulated and fabricated. Document No.2, certified copy of FIR dated 16.12.1997 is not relevant to the case.

5. Before the Lower Court, the Lease deed was seriously disputed by the respondent on the ground that it is a fabricated document. After considering the legal submissions, the Lower Court permitted receipt of certified copy of the F.I.R., dated 16.12.1997 (Document No.2) and the original Receipt acknowledging the payment of Rs.50,000/- (Document No.3.), subject to proof and relevancy. The prayer of the petitioner/2nd defendant was disallowed in respect of Document No.1, xerox copy of the unregistered Lease Deed, dated 07.07.1989. Aggrieved against the said order, the present Revision Petition is filed.

6. Mr. R.T. Doraisamy, learned counsel for the petitioner submitted that the Lower Court ought to have permitted marking of the xerox copy of the unregistered Lease Deed dated 07.07.1989 for the collateral purpose of proving the tenancy for a period of five years on a monthly rent of Rs.14,000/-. He further contended that inasmuch as the genuineness of the said document is disputed by the respondent the document could be marked, subject to the admissibility of the same at the time of trial. Marking of the above said document is very much required for the purpose of proving his case that the Mortgage Deed relied upon by the respondent is only a sham and nominal and that the refusal to receive Document No.1 is prejudicial to his case. He further submitted that in the Lower Court a notice has been served on the counsel for respondent/plaintiff directing him to produce the document as per the provisions of Section 65 of the Evidence Act, for which a reply has been filed to the effect that no such document is available with the respondent/plaintiff.

7. In support of his contention, learned counsel for the petitioner submitted a decision of this Court reported in 2002(3) CTC 739, (Chellammal Vs. Meenakshi). The said judgment deals with the admissibility of unstamped or insufficiently stamped documents. There is quarrel over the said proposition that an unstamped or insufficiently stamped document can be marked subject to the admissibility, provided the parties are willing to pay the deficit stamp duty and the penalty.

8. Per contra, Mr.M.Baskar, learned counsel for the respondent vehemently contended that there was no such Lease Deed executed by the respondent/plaintiff and that the said document is only a fabricated one. He also denied the existence of the lease between the parties and submitted that a xerox copy of the unregistered Lease Deed should not be received even for collateral purposes. He placed reliance on the

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decisions of this Court reported in 2002 (4) L.W.147 (The Tamilnadu Industrial Investment Corporation Ltd., Chennai Transport Branch vs. N.Swaminathan and two others) and 2006 (1) MLJ 699 (K.Mohammed Rafee vs. A.G.Akbar Sherief).

9. Section 65 of the Evidence Act deals with the case in which secondary evidence may be given of the existence, condition, or contents of a document in the following cases :

> "(a) When the original is shown or appears to be in the possession or power - of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it; and when after the notice mentioned in Section 66, such person does not produce it ;
>
> (b) …;
>
> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time; ..."

10. The only reason assigned by the petitioner/2nd defendant is that the said documents were mixed up with other documents and hence, he was unable to produce the same along with the written statement. Admittedly, it is not the case of the petitioner that the alleged Lease Deed was in the possession of the adversary. Therefore, there is no purpose in demanding production of the document. It is also not the case that the document was lost or destroyed.

11. Considering the plea of marking xerox copies of the said documents, on the ground that the originals were misplaced, this Court in 2002 (4) L.W. 147 (The Tamilnadu Industrial Investment Corporation Ltd., Chennai Transport Branch vs. N.Swaminathan and two others) in paragraph 6, has held as follows :

> "it is incumbent upon the Trial Court to take extreme care and caution to see whether the petitioner was really placed in such an extreme situation, where it was not in a position to produce the originals in order to permit the petitioner to rely upon the xerox copies of those documents. It will have to be borne in mind that xerox copies will not always tally with the originals and we cannot rule out the possibility of any interpolation being made in the xerox copies. In other words, xerox copies being inferior in character vis-a-vis originals, the dispensation of filing of the originals can be considered only under exceptional circumstances and not as a matter of routine".

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The Court, while rejecting the prayer for marking the xerox copy of the alleged document, further observed that the averments, "during the course of shifting the office, the documents were misplaced" has been made in a casual manner.

12. In 2006 (1) MLJ 699 (K.Mohammed Rafee vs. A.G.Akbar Sherief), this Court has held as follows:

> "Only in exceptional circumstances, only when the original is not available, in the interest of justice, the Court can permit the party to file the xerox copy."

In the above case, this Court declined the plea to mark the xerox copy of the unregistered document even for collateral purposes, when the original was available.

13. In Rathinambal vs. P.Rajasekaran and others (2006 (2) CTC 177), this Court considered as to whether a xerox copy of a Will can be marked as a secondary evidence in the absence of pleadings that the original was with the plaintiff therein and that it was not even shown as a document in the list of documents. Held that the refusal to grant permission to let in secondary evidence is justified.

14. As stated supra, the averment in the petition to receive the documents is that, "the documents enlisted hereunder are mixed up with other documents" and hence he was unable to produce them along with the written statement. There is absolutely no pleading as to whether there was any bonafide search. The words "lost or destroyed" are clear, unambiguous and are susceptible to only one meaning. "Mixed up with other documents" does not mean 'lost' to invoke section 65 (c) of the Evidence Act. The said Section contemplates that secondary evidence is not permissible "for any reason arising from his own default or neglect." In the above said circumstances, xerox copy of the unregistered Lease Deed, dated 07.07.1989 cannot be received as evidence, much less for collateral purposes.

15. In view of the above, there is no irregularity in the order of the Lower Court, in rejecting the marking of the xerox copy of the unregistered Lease Deed. In the result, the Civil Revision Petition fails and the same is dismissed. Consequently, connected M.P.No.1 of 2006 is closed. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

The Addl. District Judge,
Fast Track Court No.1, Coimbatore.

+1cc to Mr.M.Baskar, Advocate Sr 41158
+1cc to Mr.R.T.Doraisamy, Advocate Sr 41142

TEJ (CO)
km/4.10.

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